

(2017) 04 BOM CK 0184
In the Bombay High Court
Case No : 14102 of 2016

M/s. Gogte Minerals

APPELLANT

Vs

M/s. Ajay Shivajirao Bhonsle and others

RESPONDENT

Date of Decision : 04-04-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Environment (Pro

Citation : (2017) 04 BOM CK 0184

Hon'ble Judges : A.S. Oka, A.K. Menon

Bench : SINGLE BENCH

Advocate : Rafique Dada, Yashraj Singh Deora, Swati kamat, Deepak Livingston, Vidur Legal, Saket Mone, Sangramsingh Bhonsle, Vishesh Kalra, Aarti D. Bhonsale, Subit Chakrabarti, Vidhii Partners, Parag Vyas, Jitendra P. Jagtap

Judgement

1. Heard learned senior counsel appearing for the Petitioner, the learned counsel appearing for the first Respondent and the learned counsel appearing for the third Respondent. 2. By this Petition under Articles 226 and 227 of the Constitution of India, the Petitioner has impugned the order dated 18th November 2016 passed by the Pune Bench of the National Green Tribunal (Western Region Bench at Pune) in an Appeal preferred by the first Respondent under Section 16 of the National Green Tribunal Act, 2010 (for short "the NGT Act"). The preliminary objections were raised by the Petitioner (the fourth Respondent in the said Appeal) to the maintainability of the Appeal and to the maintainability of the prayers made in the Appeal. The said objections were overruled by the National Green Tribunal by the impugned order and directed that the Appeal be expedited. 3. The learned senior counsel appearing for the Petitioner invited our attention to the Memorandum of Appeal filed by the first Respondent. He submitted that the purported order dated 2nd September 2015 is not at all an order which could be appealed against under Section 16 of the

NGT Act. He submitted that the order accepts an undertaking given by the Petitioner and directs that it should not undertake any further dumping outside the mining lease area of over burden/waste unless prior permission is sought from the Ministry of Environment and Forests. He submitted that the communication dated 2nd September 2015 merely accepts the undertaking of the Petitioner and, therefore, it cannot be an appealable order. Inviting our attention to the prayer clause (ii) of the Memorandum of Appeal filed by the first Respondent, he submitted that the said prayer is hit by the principles of analogous to res judicata. He seeks to rely upon the several documents in support of his plea that apart from the fact that the prayer clause (ii) cannot be considered in the Appeal under Section 16 of the NGT Act, the same is hit by the principles of analogous to res judicata. 4. At this stage, we may note here that the learned counsel appearing for the first Respondent on instructions states that the first Respondent will not press the prayer clause (ii) in the Appeal. However, at the time of hearing of the Appeal, the first Respondent will seek consequential reliefs as a consequence of setting aside the order dated 2nd September 2015. 5. The learned senior counsel appearing for the Petitioner submits that apart from the fact that the Appeal against the so called order dated 2nd September 2015 is not maintainable, the Tribunal established under the NGT Act cannot pass any consequential directions even if the Appeal is allowed. He submits that the Petitioner may be heard on this aspect of lack of power vesting in the Tribunal to pass consequential orders. 6. We have considered the submissions. We accept the statement of the learned counsel appearing for the first Respondent that the first Respondent will not press the prayer clause (ii) in the Memorandum of Appeal. We, accordingly, direct the first Respondent to carry out amendment to the Memorandum of Appeal. 7. The first prayer is for challenging the order dated 2nd September 2015. As far as the third prayer in the Memorandum of Appeal is concerned, it is only for calling the record of the inquiry in respect of the order dated 2nd September 2015. The fourth prayer is not a substantive prayer and it is a prayer for interim relief. 8. The learned counsel appearing for the first Respondent submitted that by preferring an Appeal, the first Respondent has invoked the Clause (g) of Section 16 of the NGT Act. Section 16 of the NGT Act reads thus : "16. Tribunal to have appellate jurisdiction. - Any person aggrieved by,- a. an order or decision, made, on or after the commencement of the National Green Tribunal Act, 2010, by the appellate authority under section 28 of the Water (Prevention and Control of Pollution) Act, 1974; b. an order passed, on or after the commencement of the National Green Tribunal Act, 2010, by the State Government under section 29 of the Water (Prevention and Control of Pollution) Act, 1974; c. directions issued, on or after the commencement of the National Green Tribunal Act, 2010, by a Board, under section 33A of the Water (Prevention and Control of Pollution) Act, 1974; d. an order or decision made, on or after the commencement of the National Green Tribunal Act, 2010, by the appellate authority under section 13 of the Water (Prevention and Control of Pollution) Cess Act, 1977; e. an order or decision made, on or after the commencement of the National Green Tribunal Act, 2010, by the State

Government or other authority under section 2 of the Forest (Conservation) Act, 1980; f. an order or decision, made, on or after the commencement of the National Green Tribunal Act, 2010, by the Appellate Authority under section 31 of the Air (Prevention and Control of Pollution) Act, 1981; g. any direction issued, on or after the commencement of the National Green Tribunal Act, 2010, under section 5 of the Environment (Protection) Act, 1986; h. an order made, on or after the commencement of the National Green Tribunal Act, 2010, granting environmental clearance in the area in which any industries, operations or processes or class of industries, operations and processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986; i. an order made, on or after the commencement of the National Green Tribunal Act, 2010, refusing to grant environmental clearance for carrying out any activity or operation or process under the Environment (Protection) Act, 1986; j. any determination of benefit sharing or order made, on or after the commencement of the National Green Tribunal Act, 2010, by the National Biodiversity Authority or a State Biodiversity Board under the provisions of the Biological Diversity Act, 2002, may, within a period of thirty days from the date on which the order or decision or direction or determination is communicated to him, prefer an appeal to the Tribunal: Provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed under this section within a further period not exceeding sixty days." 9. We have perused the show cause notice issued on 11th May 2015 by the Government of India to the Petitioner. Clauses 2 to 4 of the said show cause notice read thus: "2. Whereas, Ministry has received complaint relating to the illegal dumping the waste by the M/s. Gogte Minerals, beyond the lease area without obtaining an environment clearance. It has been alleged that M/s. Gogte Minerals is illegally dumping waste at Survey No. 177/1 Ajgaon Village in contravention of the Environment Protection Act, 1986. The EC was granted to the project for an area of 34.4812 ha of which mining was to be carried out in 12.16 ha and area of 5.98 ha was to be kept for waste dumping 0.02 ha for infrastructure, 1.08 ha for roads, 10.50 ha for green belt, 2.0 ha for other engineering structures and 2.6412 ha will be unutilized. No permission for dumping outside the mine lease was given; 3. Whereas, while examining the application no.14 of 2015 it is noted that M/s. Gogte Minerals is illegally dumping waste outside the mine lease at Survey no. 177/1 Ajgaon Village and this is in violation of the compliance of EC conditions and in contravention of Environment (Protection) Act, 1986. 4. Now, therefore, under Section 5 of Environment (Protection) Act, 1986, you are hereby directed to show cause within 30 days of receipt of this notice as to why the closure order to M/s. Gogte Minerals not be issued. In your response, it may also be clearly stated whether a Hearing is required by the Project Proponent before a final order is passed by this Ministry. It may also be noted that if no response is received within 30 days, appropriate orders as deem fit under the Law will be passed and issued under the circumstances of the case without any further notice to you." 10. We have perused the communication dated 2nd September

2015. The first paragraph of the said communication refers to the show cause notice dated 11th May 2015 under Section 5 of the Environment Protection Act, 1986 (for short "the said Act of 1986"). The second paragraph refers to the reply submitted by the Petitioner to the show cause notice. The fifth paragraph refers to the personal hearing given to the Petitioner. The Paragraphs 5 to 7 of the communication dated 2nd September 2015 read thus: "5. A personal hearing to the PP was given on 10.08.2015 after considering the submissions of the lessee, it was opined that even though the lessee has continued it's operations of maintaining dumps outside the mining lease area based on it's bona fide impressions, however, pursuant to the Hon'ble Supreme Court declaring the law in Goa Foundation v. Union of India Writ Petition No. 435 of 2012, a separate Environmental Clearance would be required for the purpose of dumping material waste outside the lease area. No further dumping can be permitted to be undertaken outside the mining lease area without seeking clearance from the Ministry to undertake such a process. 6. The mine lessee accordingly sought time to consider the suggestion of Ministry and the matter was fixed for further hearing on 21.8.2015. On the said date the mine lessee has informed the Ministry that the lessee had already suspended dumping operation outside the mine lease since April 2015 and that it would not resume the said dump operations outside the lease area. Further lessee has also informed that in the future if required, the lessee shall apply for necessary permission from the Ministry before undertaking maintaining of over burden dumps outside the mining lease area. 7. Keeping in view the facts and circumstances of the case, the lessee shall be bound to its undertaking and it should not undertake any further dumping outside lease area of over burden/waste unless prior permission is sought and obtained from MoEF." (underline added) 11. Section 5 and 5A of the said Act of 1986 read thus: "5. Power to give directions. Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions. Explanation - For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct (a) the closure, prohibition or regulation of any industry, operation or process; or (b) stoppage or regulation of the supply of electricity or water or any other service. [5A. Appeal to National Green Tribunal. Any person aggrieved by any directions issued under section 5, on or after the commencement of the National Green Tribunal Act, 2010, may file an appeal to the National Green Tribunal established under section 3 of the National Green Tribunal Act, 2010, in accordance with the provisions of that Act.]" 12. Therefore, under Section 5 of the said Act of 1986, there is a power vesting in the Central Government to issue directions to any person or any authority. The power under Section 5 can be exercised directing closure, prohibition or regulation of any industry, operation or process. There is also a power conferred directing stoppage or regulation of the supply of electricity or water or any other service. The Paragraph 5 of the

communication dated 2nd September 2015 shows that at the time of personal hearing given to the Petitioner, a view was expressed that the Petitioner has continued its operation of maintaining dumps outside the mining lease area allegedly based on its bona fide impressions. The Paragraph 5 also provides that a separate environmental clearance would be required for the purposes of dumping material waste outside the mining lease area. The Paragraph 6 records an undertaking of the Petitioner given on 21st August 2015. The Paragraph 7 contains the directions issued on the basis of the undertaking. On conjoint reading of the Paragraphs 5, 6 and 7 of the communication dated 2nd September 2015, it is crystal clear that the said communication is an order disposing of the show cause notice dated 11th May 2015. We are not concerned with the issue whether the Central Government is right or wrong in disposing of the show cause notice by accepting the undertakings of the Petitioner. 13. Under Clause (g) of Section 16 of the NGT Act, an Appeal is maintainable at the instance of any person aggrieved by any direction issued under Section 5 of the said Act of 1986. Even under Section 5A of the said Act of 1986, it is provided that any person aggrieved by any direction issued under Section 5, on or after the commencement of the NGT Act, may file an Appeal to the National Green Tribunal in accordance with the provisions of the said Act of 1986. 14. Without going to the question whether the order of disposing of the show cause notice is right or wrong, we have no hesitation in holding that the communication dated 2nd September 2015 contains order/direction issued on the basis of the show cause notice dated 11th May 2015 issued under Section 5 of the said Act of 1986. Therefore, an Appeal against the said order at the instance of the first Respondent who claims to be aggrieved by the said order/direction is certainly maintainable under Clause (g) of Section 16 of the NGT Act. 15. As far as the contention based on the prayer clause (ii) in the Memorandum of Appeal is concerned, the same need not be gone into as the learned counsel appearing for the first Respondent has made a statement that he is not pressing the said prayer clause (ii). 16. The National Green Tribunal has been conferred jurisdiction to entertain an Appeal against the directions issued under Section 5 of the said Act of 1986. It is implicit in the appellate power conferred on the Tribunal that the Tribunal has power to pass consequential directions in the event the Tribunal chooses to interfere with the impugned order or decision or direction. At this stage, we cannot adjudicate upon the question as to what directions could be lawfully issued by the Tribunal under the said Act of 1986 if the Appeal preferred by the first Respondent is allowed. 17. The objection based on the principles of res judicata will have no application as far as the prayer clause (ii) in the Memorandum of Appeal is concerned as we have held that the Appeal against the order dated 2nd September 2015 is maintainable. It is not the case of the Petitioner that any other Appeal was preferred by the first Respondent against the same order. 18. Suffice it to say that the Appeal preferred by the first Respondent will remain confined to the first prayer made therein and the prayer for calling for the record of the show cause notice and order dated 2nd September 2015. 19. Hence, we do not find any merit in the preliminary

objections raised by the Petitioner about the maintainability of Appeal which were overruled by the Tribunal. 20. Hence, we pass the following order: ORDER : (a) We accept the statement of the learned counsel appearing for the first Respondent that the first Respondent will not press for the reliefs sought in terms of the prayer clause (ii) in the Memorandum of Appeal with liberty to seek consequential directions in the event the Appeal is allowed; (b) We direct the first Respondent to carry out amendment for deleting the prayer clause (ii) in the Memorandum of Appeal within a period of three weeks from the date on which this judgment and order is uploaded; (c) We make it clear that we have not made any adjudication on merits of the Show Cause Notice dated 11th May 2015 and the impugned decision/order dated 2nd September 2015; (d) All contentions raised in that behalf are expressly kept open to be decided by the Appellate Authority; (e) The Petition is disposed of on above terms; Petition disposed of.